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THE IMPACT OF PREPAID LEGAL SERVICES UPON THE MINORITY BAR

Philip J. Murphy

One of the new approaches to providing legal aid is a development called prepaid legal services. There is considerable controversy about this concept. Some of the issues are: Will it fulfill its promise of low cost and quality service to the client-consumer? Will it so severely change the pattern of selection that it will be threatening to attorneys? Will it have a special impact upon minority attorneys? Happily, the topic of prepaid legal services is one in which everyone may discourse freely, unimpeded by sufficient evidence or facts to sustain or disprove any strawman arguments.¹

A few skeletal plans have been operating since 1971. However, plans that offered more substantial services began in 1975. To evaluate the possibilities of prepaid legal services, it is necessary to understand the background, to examine the plans that are operative, and to assess the legal obstacles. A tentative conclusion might then be reached about the possible impact of prepaid legal services upon the profession, and particularly the minority practitioner.

I. DEFINITION OF PREPAID PLANS

A working definition of prepaid plans might be one in which there is payment in advance for legal services that the individual may need or use in the future. The essence is that there be a prepayment, sometimes called an insurance premium, a membership assessment, or a subscription charge. This payment may be paid by the individual to be served or by some third party for him. Individual payments are sometimes authorized as voluntary payroll deductions,² or withdrawals from credit union accounts.³ The individual might also make one subscription payment directly to the plan.⁴ All of these

1. There is an excellent and concise bibliography (six pages) available from the National Consumer Center for Legal Services, 1750 New York Avenue, N.W., Washington, D.C., 20006. See also B. Christenson, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (1970) which contains 430 citations to other references. An extremely definitive bibliography of materials relating to the practice of law was assembled by Steve Berlin in an unpublished monograph for the Group Legal Institute of California, 2209 Van Ness Avenue, San Francisco, California, 94109.

2. The voluntary payroll deduction was the way in which Los Angeles teachers were going to pay for a proposed plan of legal services that never became operative. Although there were no technical problems about another checkoff item, counsel for the school district advised that a deduction could not be allowed since there was no specific provision in the California Education Code authorizing deductions for plans of legal service. Enabling legislation would be required. This objection was only one of the straws that caused the eventual breakdown of negotiations of this plan in 1971.

3. An example of this method is the plan of the Utah Credit Union League.

4. Members of the Berkeley Cooperative Society in California individually pay Consum-

forms of prepayment are made by individuals who are members of groups that have contracted for a plan of prepaid legal services for its members at certain low rates, but participation by an individual member is voluntary.

Between 1969 and 1972, an organization called American Legal Aid, Inc. operated in Casper, Wyoming and sold policies of fairly broad coverage to the general public. There were about 4,000 policyholders throughout the various Rocky Mountain states. This interesting plan was designed along automobile club membership lines. About six or seven salesmen sold the policies by a combination of telephone and personal contacts. No policies were issued upon written application alone. All required screening. Pre-existing legal problems or ones which were immediately detected were not covered. This selective selling allowed the company to eliminate bad risks and operate with financial soundness. Although the plan was a fully open panel, meaning that members could freely choose any lawyer they so desired, a substantial number of Wyoming lawyers vigorously opposed the operation.

The opposition succeeded in halting these operations through law suits, claiming that ALA was misleading the public by the use of the 'legal aid' in its corporate name. The corporation was also attacked by the Insurance Commissioner of Wyoming seeking to enjoin its operation because it was an insurance operation but was not licensed as such. In 1972, it ceased doing business.

Outside the U.S., other countries are also offering prepaid legal plans to the general public. In 1974, individual policies were first offered in Great Britain through a Lloyd's underwriter, Strover & Company, Ltd.⁵ Prepaid legal coverage is also offered on the European continent to individuals sometimes in conjunction with what are considered 'homeowners' policies here, but sometimes as straight legal insurance.⁶ The projected plans of several bar association sponsored plans contemplate an eventual offering to general members of the public. However, as of January 1975, there were no individually acquired policies of prepaid legal insurance or services in the United States to which any member of the general public may belong and participate.

II. VARIETIES OF PLANS

There can be an infinite variety of plans according to the way in which service is provided, the amount of benefits promised, or the organizations sponsoring such plans.

The most controversial way in which to classify plans at this stage of development is the *way in which services of lawyers are provided* under these

ers Group Legal Services, Inc., a subscription fee of \$25 for one year or \$40 for two years enrollment in their plan.

5. This offering for 'Mr. Average' began in July, 1974, and offered legal costs and expenses insurance to pursue or defend certain types of civil matters and defend all criminal charges. The individual was to pay ten percent of all costs, except for advice, and Lloyd's would pay ninety percent. The annual premium is quite low: \$8 would cover costs up to \$1,000. There are higher premium options to a maximum of \$14 securing a coverage up to \$10,000.

6. There is a comprehensive study written by Werner Pfenningstorf, Research Attorney at the American Bar Foundation, upon the European experience in financing legal services. This very helpful paper is soon to be published and will then be generally available.

new systems. How are the lawyers to be selected and who shall do the selecting? Here are some of the options.

First, *the individual members of the group served must go for service to a lawyer or group of lawyers that are full time employees of the organization itself.* This model is the way in which services are now provided in more than 97 of the legal service plans that provide lawyers and legal services to the poor. This design would be called a fully closed plan.⁷ The leadership of the National Legal Aid and Defender Association, the American Bar Association, and the OEO legal services program have argued consistently that this design was the cheapest and most effective, quantitatively and qualitatively, to give more poor persons good legal services at the lowest cost. Furthermore, the fully closed plan has been the one approved both by the American Bar Association and the Congress of the United States for the use of federal money to expand legal services to the poor.⁸ In spite of the support for this approach, it has never been unchallenged or secured from one session of Congress to the next. Nor has it been without problems in the official position of the American Bar Association.⁹

It is worthwhile to note the role of the minority lawyer in the OEO legal service program¹⁰, for the situation there somewhat parallels developments in prepaid legal services now. There were conscious efforts made to obtain Black lawyers to serve predominantly Black poverty areas. The heads of these programs in New York, Los Angeles, Washington, Newark, Cleveland, and Kansas City were initially, or at least by 1967, Black lawyers.

In Chicago, Detroit, and San Francisco as well as in some other major population centers, there were Black lawyers in influential positions in the system of legal services to the poor. However, they were generally rare because recruitment was difficult; the older lawyers were not interested in the low salaried positions and the supply of new lawyers was limited because of competition with corporate or firm openings. These new lawyers wanted security not risks. There were even fewer Mexican American and American Indian lawyers in programs serving those minority populations.

7. Examples of the fully closed panel would be the plans of Laborers' Local 423 at Columbus, Ohio, and the Laborers' District Council of Washington, D.C., although both of these plans allow for payment of outside counsel in certain situations.

8. In the formative years of 1965 to 1967 the National Bar Association jointly with the American Bar Association supported expansion of the staff lawyer system in statements filed and testimony given before Congress. This joint support is evidenced by statements filed with the House of Representatives Committee on Education and Labor in hearings held by it on OEO legal services between 1965 and 1967.

9. The usual challenges from 1965 to 1969 were that no program funds should be used to finance litigation against the government and that there should be more "Judicare" programs allowing for payment of fees for service to individual lawyers chosen by the poverty client. "Judicare" programs derive their name from the original proposal by the Wisconsin State Bar to the OEO legal services program. In that program the individual poverty client was free to choose an individual lawyer in the community. In turn the lawyer billed the program at an agreed upon rate for services rendered. The few experimental programs funded by the Department of Health, Education and Welfare were of the "Judicare" variety. The Legal Services Corporation Act enacted in 1974 would require the corporation to evaluate the effectiveness of the different systems. That corporation is not yet operative.

10. The Economic Opportunity Act of 1974 was construed to allow the formation of legal service programs for the poor as a means of combating the poverty cycle. No legal programs, however, commenced operations until late 1965. After that point, growth was rapid, particularly in the large urban centers, and the program has now reached an expenditure level of approximately \$80,000,000 per year in federal funds.

The minority lawyer in the outlying neighborhood office often viewed the neighborhood poverty legal office as a competitor that took away part of the prospective clients that kept the local practitioner alive. In the frequent debates about the desirability of the staff lawyer as opposed to the free choice of lawyer or *judicare* approach, many minority bar associations favored the *judicare* system.¹¹

Second, *the individual member of the group must go to one lawyer or law firm or has a choice within a narrow group of firms.*¹² The lawyers and law firms also handle clients other than members of the particular group plan. This approach would be described as a partly closed plan. It is the model most easy to implement when a lawyer handling the corporate affairs of the group is asked by the group to draw up a plan for the personal legal needs of group members. However, for plans that offer substantial coverage, about one half of the planners did not choose this easy way out.¹³

Third, *the individual may go to any lawyer who is enrolled as a participating lawyer in a broad panel, usually within a defined geographical area.* Such an approach would be a partly open plan. Participation may be open to all lawyers in the area or the state, provided that they meet conditions such as: (1) errors and omission coverage; (2) an entry fee; (3) an agreement to charge reasonable or modest fees, or fees that are less than the prevailing norm; (4) an agreement to accept a pro rata amount for work billed if funds in the plan are insufficient to pay all obligations in full.¹⁴

Fourth, *the individual client of the group may choose any duly licensed attorney anywhere in the United States.* This approach is the fully open plan. It was the approach tested in three years of experiment at Shreveport, Louisiana.¹⁵ After Laborers' Local 229 took over the entire responsibility for the plan in February 1974, this same approach was continued. The two

11. Most local associations were concerned that the poverty program posed an economic threat to their members. Some felt that the poverty staff lawyers sometimes relaxed eligibility requirements and accepted clients beyond the income guidelines fixed for the program. In some cases, better understandings were reached and the OEO offices worked out referral systems for ineligible clients within the private neighborhood offices, e.g., the arrangements between the southside office of OEO Legal Services and the Cook County Bar Association. The Washington Bar Association at Washington D.C. and Black groups in Kansas City and St. Louis had the same concern.

12. Examples would be the plan of the Chicago Joint Board of Amalgamated Clothing Workers; the Alaska Teamster-Employer Prepaid Legal Service Plan, Laborers' Local 559 at Birmingham, Alabama.

13. The law firm chosen for ACW workers in Chicago was not the firm that handled the corporate business of the union. According to Murray Finley, then manager of the Chicago Joint Board and now president of the International Union, "We chose this law firm because they had expertise in and understood the problems of our people." The union lawyer for the North Carolina Teamsters recommended an open panel approach for an experimental plan tried there in 1974. In Columbus the union attorney recommended the staff approach that was adopted. Where services are more limited, e.g., to job-related legal problems only, there appears to be much more likelihood that the union firm will expand to absorb these individual cases. The filings in the 800 group plans registered with the State Bar of California seem to confirm this tendency.

14. These were the original lawyer participation requirements for California Lawyer's Service. The Utah plan has the same pro rata provision which makes the lawyers in the plan the riskbearers for the performance of the plan.

15. The Shreveport plan was first instituted in January 1971. For details see Marks, Hallauer & Clifton, *The Shreveport Plan: An Experiment in the Delivery of Legal Services* (American Bar Foundation 1974) [hereinafter cited as Marks].

operating plans, underwritten by Stonewall Insurance Company at Minneapolis, Minnesota and the state of Maryland, are fully open. Until recently all proposed insurance company policies allowed for total free choice. Similarly, the Blue Cross or Blue Shield organizations that have seriously explored possible expansion into legal services have designed free choice plans.

Fifth, there can obviously be a *mixture* of ways in which the services of lawyers are provided to the users. In its recent marketing efforts, the Midwest Mutual Insurance Company has offered alternative plans in which the individual member of the group may elect to use Hypothetical Plan A under the policy. He then goes to a lawyer preselected by the group who will perform the legal services covered under the policy. The lawyer will be paid by the company, and the client has no further payment to make. If the client elects to use Plan B, he may choose any lawyer in the community, and the company will indemnify him up to stated amounts for covered legal services performed by his lawyer. He may or may not have to pay further amounts to the lawyer for the full cost of service.

In the plan of the Laborers' Washington District Council, service is normally available only through a staff lawyer located in downtown Washington. However, the plan will pay fees for service to outside counsel in situations where the matter can be more conveniently handled and where the individual laborer indicates he wishes to retain local counsel. Such cases are usually ones where the work is performed in Maryland, Virginia or West Virginia. On these occasions, the managing attorney for the plan tries to negotiate reasonable fee arrangements with such local counsel.

Plans can also be classified according to the *benefits offered* by the plan. Plans may offer only advice and consultation on a fully prepaid basis with further legal services being the individual responsibility of the client. Such extended services may be performed at customary fees or for amounts understood by the group and the individual client to be less than fees prevailing in that community for like services. These 'advice only' plans have been criticized by some as being devices to attract more lucrative legal business based on the lure of inexpensive initial advice. Unquestionably this danger exists. There will always be some lawyers principally concerned with the profit-making possibilities of clients rather than the treatment of the 'whole man' in his legal problems. Yet the risk of such profiteering is clearly outweighed by the advantages of early and accessible counseling by a lawyer. The business community and the wealthier individuals in our society appreciate full well the value of planning and preventive law. They use lawyers in their advisory roles more frequently than as advocates in litigation.¹⁶

Some of the newer group plans avoid the criticism of feeding in business to the firm that provides the advice benefit under a plan. Group Legal Services, Inc., of Los Angeles charges \$25 per year to provide individual members of a group who sign up for the plan unlimited telephonic advice by

16. There are many statistics about the legal profession. The most complete is the AMERICAN BAR FOUNDATION, 1971 LAWYER STATISTICAL REPORT (1972). Unfortunately, there are no reports that tell us how much time various kinds of lawyers with their various strata of clients spend on advice and counselling, or broadly preventive law, as opposed to preparation for or participation in litigation.

lawyers and referrals to different lawyers for any further services required. The plan utilizes a Wide Area Telephone Service (WATS) line on which members telephone for legal advice. The line is answered by one of the seven lawyers of this Westwood law firm. If the question can be answered effectively and sufficiently on the telephone, the advice is given. About 75% of the inquiries are so handled. If further service is needed, the client is referred to a lawyer in his area who may be a general practitioner or specialist in the legal problem posed by the client. There are now over 700 lawyers throughout California accepting such referrals, and they agree to charge plan members somewhat less than prevailing fee levels. Group Legal Services serves as purely a telephonic advisory service. They do not benefit financially from the cases referred. Cases are 'fed out' rather than 'fed in'. The immediacy and effectiveness of the referral feature is, of course, helpful in inducing members to enroll in the plan.

Beyond the advice and consultation stage, benefits offered can cover the universe of personal legal problems or only a specified few. The Shreveport plan had most of the fundamentals that are found in other plans. Shreveport provided \$100 worth of advice and consultation on any problem, \$250 worth of office work of a lawyer, \$325 of litigation time, \$40 for court costs, \$150 for out-of-pocket expenses on litigation, and major legal coverage of \$800 of \$1,000 additional defense benefits. The union member had to pay a deductible of the first \$10 of office work benefits, \$25 of litigation benefits if he was the plaintiff, and the 20% copayment¹⁷ on the major legal defense benefit. The potential dollar benefits in one year were \$1,665. If the member did not use the plan during the first year, the benefit was doubled. These benefits were available to the union member and his dependents.

The Shreveport benefit approach has been copied in Utah, New Mexico, Ohio and elsewhere. It has not been held out as an appropriate design of groups everywhere. It has worked well in Shreveport.¹⁸ The designers of the Shreveport plan considered that its first three benefit components fitted the normal work roles of lawyers. The dollar limits and the deductibles were meant to control excessive usage. However, they were considered sufficient to meet the best estimate of what the normal personal legal needs of a member of that group might require.

In other plans, possible benefits are stated in terms of hours of legal service available. Examples would be: three hours per coverage year per family;¹⁹ eighty hours of legal services during each calendar year in connection with up to five matters or proceedings per calendar year.²⁰ The bene-

17. Copayment means that the individual member or policy holder must make some percentage of payment along with payments made by the plan. This is how most major medical and health policies are written. For example, the plan pays 80% of costs incurred and the individual 20%, or 75% and 25%, or 90% and 10%, or 60 and 40%.

18. Data and statistics on Shreveport are contained in a number of publications. An analysis of how it worked for lawyers and clients is found in Marks, *supra* note 15. A final report for the Ford Foundation on the three experimental years will be available through the American Bar Association in early 1975.

19. Extract from plan of Michigan Education Association Legal Services plan for East Lansing teachers.

20. Extract from plan of Laborers' Local 423 Legal Services Plan, Columbus, Ohio.

fit in terms of hourly amounts is more often associated with full-time staff attorney operations rather than with a fully or partly open panel of lawyers.

In still other plans, the benefits resemble a surgical schedule in a medical plan. So many dollars are allowed for specified legal tasks. The Stonewall Insurance plan for the Maryland Credit Union League lists 35 different procedures for which allowances are made: e.g., "Name change. . . First person in family. . . \$50." The amount is not necessarily meant to pay for the legal service in full. The client may have to pay the lawyer of his choice a further amount.

The amount of benefits, however stated, clearly depends upon the amount of prepayments contributed to the plan and the estimated frequency of usage by individual members and eligible dependents. There has been so little experience with usage of plans that it is very difficult to distill any generalizations that have actuarial significance or respectability.

The fullest possible way to state benefits is "The plan will pay for all reasonable legal services provided by a panel attorney and expenses incurred by an eligible employee or his eligible dependents with the exceptions noted. . . (certain normal exclusions)"²¹. All advice, office work, civil and criminal litigation, including personal injury and probate is covered without limitation if within the geographic limits of the state.

All plans have exclusions for a variety of reasons. To minimize usage, many exclude filling out income tax returns, handling small claims, traffic court cases, major criminal matters, and/or all plaintiff matters. The payment of fines and penalties or judgments taken against the client are excluded from most of the plans. To keep the parties to the plan happy, suits against the immediate parties to the plan are excluded. This exclusion is required for jointly trustee plans authorized under section 302(c) of the Labor Management Relations Act. Usually, fee-generating cases such as personal injury, workman's compensation and probate are excluded. An exclusion that is a cost control device is one that excludes 'unreasonable' fees.²²

Plans may also be classified according to the organizations that bring them into operation. Of the plans now in operation, those designed and begun by *consumer groups* account for the majority: the plans of various locals of Laborers' International Union in Columbus, Ohio, Washington, D.C., Birmingham, Alabama, Phoenix, Arizona, the State of Alaska; the Amalgamated Clothing Workers of Chicago, Illinois; the cooperative plans at Berkeley, California, and Ann Arbor, Michigan; the teachers' plans in Columbus, Ohio, Green Bay, Wisconsin, Maine, California; the Teamsters in Alaska and North Carolina; and the public employees in New York. There are other Laborers' and Teamsters' plans in fairly immediate prospect as well as considerable movement by public sector employees.

Credit union plans have sometimes been designed by the group itself²³ in conjunction with consultants, *bar associations*²⁴ and sometimes by insur-

21. Extract from plan of Alaska Teamsters-Employer Prepaid Legal Services Plan.

22. Unreasonable fees in the Shreveport plan are subject to review by a special committee of the Shreveport Bar Association.

23. E.g., Colorado.

24. E.g., Utah and New Mexico.

ance companies.²⁵ The only known joiner of an employer and an insurance company is the plan of Midwest Federal Savings and Loan Association in Minneapolis, underwritten by Stonewall Insurance. The Shreveport plan was a joint effort by the bar and the union.

III. POPULATION COVERED AND COST OF PLANS IN OPERATION

There are now in operation about forty plans that offer substantial legal benefits which are paid in full by the prepayments made. They reach about two-hundred thousand individual members of groups. If an average number of eligible dependents is added, perhaps five-hundred thousand Americans in the middle income levels are now receiving most of their legal services through this new system of prepaid legal services. If the total amount of group legal activity is assessed, i.e., including the total number of individuals affected, the figure becomes much higher.

However, the amount of the personal legal needs of the individual that is served by the more limited plans is, of course, much less. A person seeking a group plan lawyer for job-related legal difficulties may seek other counsel for personal problems.

There are now over eight hundred group plan arrangements registered with the State Bar of California, and they affect a client population of perhaps two million persons, or about ten percent of the total population of California. With only a few exceptions, all of these group plans are quite limited in their coverage. A number are confined to job-related matters, while some offer only limited advice and consultation.

After weighing the California experience and putting it in proper perspective, it is estimated that about four thousand to five thousand group plans are now operating in the United States. They are partly serving the legal needs of nine to ten million persons.

What has been the cost of these plans? A sample of the cost of the plans in operation today ranges from \$12 per year for the Amalgamated Clothing Workers in Chicago, to \$25 for the plan of the Berkeley Co-op, to about \$32 for Shreveport Laborers, to \$60 for the Maryland and Utah Credit Union Leagues, to about \$140 for Columbus Laborers, to perhaps \$200 per year for Alaska Teamsters. Detailed breakdowns of cost are available for some plans, but it is still too early to make any broad or possibly valid generalizations as to the most efficient systems or the quality of service furnished. In fairness, no complaints about quality of service have been heard from any of the plans. Neither have there been any searching analyses of plans to assess the elusive factor of quality of service.

IV. OBSTACLES TO DEVELOPMENT

The brash new concept of prepaid legal services has stirred up many controversies and problems. It comes as a hard shock for many lawyers that the nameless faces of hundreds of clients will be delivered to one or a few

25. *E.g.*, Maryland.

lawyers by the leadership of a group, be it a trade union, teacher or employee association or a church congregation. Yet it has been frustrating and nearly impossible for the individual members of these groups to choose a lawyer from the yellow pages.

Out of this lawyer reaction and consumer assertion the open versus closed panel controversy has been spawned, and it has abundantly fed upon the fears of both groups. Many lawyers are concerned that the individual lawyer-client relationship is threatened, that lawyers will become the captives of large group buyers and no longer remain independent, that shoddy mass services will be furnished but excused in the name of low cost, and that the average American will be denied the free choice of his lawyer. With equal fervor the consumer advocates traditionalized inefficiencies of the legal profession in solo or small firm practice, the inability of lawyers to regulate themselves, the higher cost of open panel systems.²⁶ Also of great concern is the possibility that the escalating costs associated with health services might occur in open panel legal systems. There is truth on both sides and some accomodation may be reached in the future.

The Code of Professional Responsibility of the American Bar Association (which regulates lawyers' conduct) was amended in February 1974. This amendment provides a distinction between the disciplinary rules for closed panel operations and open panel systems.²⁷ Some of the changes stipulated that closed panel lawyers were not to advertise the availability of services as freely.²⁸ Such plans had to allow members the opportunity to select a lawyer of their own choice and to have the plan pay that lawyer what they would have paid their own preselected lawyer;²⁹ the preselected closed panel lawyer could not accept matters from a client of the plan unless they were covered for that specific service under the plan.³⁰ In addition, a normative ethical consideration³¹ was added to warn lawyers to be very careful not to participate in closed panel plans because of danger to the traditions of the profession.

The changes were adopted by a vote of 144 to 117 by the House of Delegates of the ABA. Labor and consumer spokesmen, and later, government spokesmen, criticized the changes as retrogressive, unconstitutional, and violative of the antitrust laws. The president of ABA, Chesterfield Smith, indicated a possible rationale between the changes to the Code and a resolution adopted later that day which approved all plans of prepaid legal service that assured reasonable cost, quality of service, and that were in accord with the public interest and professional standards.³²

26. See Bartosic & Berstein, *Group Legal Services as a Fringe Benefit: Lawyers for Forgotten Clients Through Collective Bargaining*, 59 VA. L. REV. 410 (1973); see also Fisher, Jr., Baron & Cole, *Prepaid Legal Services: Open v. Closed Panels*, 58 MASS. L.Q. 243 (1973).

27. The previous 1969 Code also had differential provisions, but perhaps not so clearly highlighted.

28. ABA Code of Professional Responsibility DR 2-101 (B).

29. *Id.* DR 2-103(D)(5)(a)(v).

30. *Id.* DR 2-104(A)(3).

31. Ethical Consideration 33, which is part of the Code of Professional Responsibility recommended by ABA in 1974 and adopted in February 1975 as Revised EC 33.

32. President's Page, 60 A.B.A.J. 369 (1974).

From February 1974, until February 1975, only one state—Tennessee—adopted the ABA amendment. It was enacted by authority of a rule which automatically causes ABA changes to become the rule of the Supreme Court of the State.³³ After an intensive search for a defendant, other than the ABA, the National Consumer Center for Legal Services sued various parts of Tennessee and the ABA in January 10, 1975.³⁴ The suit alleged the changes violated the First Amendment³⁵ guarantees of the U.S. Constitution and the antitrust laws of the United States.³⁶

In August 1974, the American Bar Association, by voice vote of its House of Delegates, approved the appointment of a special ad hoc study group to review the rule changes adopted in February 1974. After many meetings and one public hearing, that group's recommendations would change many of the differential points of treatment between open and closed panel approaches to this new legal service. Ethical Consideration 33 has been rewritten and softened.³⁷ Advertising strictures are evened out. Profit

33. It took some correspondence and an opinion of the Attorney General to decide that whether the rule was automatically adopted was a question for decision by the United States Supreme Court. At least two other "automatic adoption" states—Wisconsin and Pennsylvania—somehow managed to stop the automatic machinery.

34. *Prelaw Society of Middle Tennessee University v. American Bar Association*, — F. Supp. — (M.D. Tenn. 197-).

35. *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *Brotherhood of Railroad Trainmen v. State of Virginia*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); *NAACP v. Button*, 371 U.S. 415 (1963).

36. The antitrust objection is that an advantage given to an open panel form of operation over a closed plan by an ethical rule gives the open panel plans an anticompetitive advantage that is offensive to the Sherman Act, as interpreted by Court decisions. See text accompanying note 41 *infra*.

37. February 1974 version of Ethical Consideration 33 provided:

Several Supreme Court decisions apparently give constitutional protection to certain organizations which furnish certain legal services to their members under legal service plans which do not provide free choice in the selection of attorneys. The basic tenets of the profession, according to EC 1-1 are independence, integrity and competence of the lawyer and total devotion to the interests of the client. There is substantial danger that lawyers rendering services under legal service plans which do not permit the beneficiaries to select their own attorneys will not be able to meet these standards. The independence of the lawyer may be seriously affected by the fact that he is employed by the group and by virtue of that employment cannot give his full devotion to the interest of the member he represents. The group which employs the attorney will inevitably have the characteristic of a "lay intermediary" because of its control over the attorney inherent in the employment relationship. It is probable that attorneys employed by groups will be directed as to what cases they may handle and in the manner in which they handle the cases referred to them. It is also possible that the standards of the profession and quality of legal service to the public will suffer because consideration for economy rather than experience and competence will determine the attorneys to be employed by the group. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully consider the risks involved before accepting employment by groups under plans which do not provide their members with a free choice of counsel.

The February 1975 version of Ethical Consideration 33 provides:

As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independent, professional, representation of the interests of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers

operations, except for the interposition of an insurance company, in the area are still prohibited.³⁸ The selection provision has been substantially rewritten.³⁹

On February 24, 1975, the House of Delegates adopted a final draft that incorporated the changes suggested by some bar associations and consumer groups. That action should considerably ease the controversy. Its effect is to eliminate the differential treatment between open and closed plans.⁴⁰

The antitrust problems that have arisen mostly affect the open and partly open plans.⁴¹ Where a group of lawyers, organized in an ad hoc form or as a bar association, set the fees for service under the plan, whether as a maximum or minimum limit, they may be guilty of price fixing and in

attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

38. Recommended DR 2-103 (D)(4)(a), Report of Ad Hoc Study Group, January 17, 1975.

39. Recommended DR 2-103 (D)(4)(e), as adopted February 24, 1975:

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

The comment thereon is:

This is to enable a member or beneficiary in either an open or closed panel plan to use counsel other than that furnished or paid for by the organization, and to assure plan provisions which, where reasonable to do so, will provide relief such as reimbursement in whole or in part, alternative legal services or in some other way.

40. The unions have become reasonably skillful buyers of mass services in many benefit programs, principally in health services. The general consumer movement is gradually becoming more cohesive, articulate, and organized. To bolster this consumer strength in legal services through shared information and technical know-how, the National Consumer Center for Legal Services was formed in July, 1972. It has developed substantial strength and prestige since then, and it will have an important role in assisting and shaping future directions in prepaid legal services. Consumer groups were "jubilant" over the changes to the Code made at the ABA meeting of February 24, 1975. (Washington Post, March 1, 1975). Cooperation between consumers and the bar is now much more likely on common problems in the field. It is also likely that the lawsuit filed in Tennessee will be dismissed. See note 2 *supra*.

41. A number of statements by various representatives of the Antitrust Division have been made on antitrust and prepaid legal service plans. One of the first spokesmen was Lewis Bernstein who spoke on "Antitrust Aspects of Bar Association Disciplinary Rules Governing Advertising, Solicitation and Recommendation of Legal Services" on February 1, 1974 at the National Conference of Bar Presidents in Chicago, Illinois. Bernstein also spoke at the ABA conference on prepaid legal services at San Francisco on December 8, 1973, "Antitrust Considerations in Prepaid Legal Plans"; this speech may be found in the conference Transcript at page 139. Bruce B. Wilson testified before the Subcommittee on Representation of Citizen Interests, Committee on the Judiciary, United States Senate, on the subject of "Minimum Fee Schedules for Legal Fees" on September 20, 1973. Joe Sims testified before the Committee on Professional Ethics of the New York State Bar Association concerning "The Antitrust Aspects of Recent Developments in Prepaid Legal Systems" on August 21, 1974. Thomas E. Kauper, head of the Division, spoke on "Prepaid Legal Services and the 'Houston Amendments'" on August 12, 1974 at the Annual Meeting of the National Conference of Bar Presidents in Honolulu, Hawaii.

violation of the Sherman Act. In prepaid plans where payments are to be made to a wide group of lawyers, it has usually been considered necessary to indicate how many dollars the lawyers will be paid for tasks performed. Such action might affect a wide segment of the providers of legal services. In plans such as Shreveport no set dollar amount for each service is suggested but merely that the fee be customary and reasonable. The Stonewall Insurance plans have dollar values of allowed fees against specified services. Such indemnity payments are only allowances, and the lawyer may charge the client additional fees. Also, insurance companies are separate third parties from the providers of service, and they do not have the antitrust problems that befall organized groups of lawyers.⁴²

The classic case to date is that of the California Lawyers' Service (CLS). CLS applied to the Department of Justice for a business review letter that would hopefully gain the guarded promise that the Department would not prosecute if the projected legal service operation of CLS went forward. The correspondence and negotiations began in May 1973, and they are not yet concluded. Satisfactory solutions seem to be reached on the price fixing objections. However, the Antitrust Division is still concerned that the Rules of Professional Conduct of the Supreme Court of California will give CLS, as a partly open panel operation, an anticompetitive edge over closed panels in the area of advertising and solicitation.

Without question the Antitrust Division is keeping a close watch upon the development of prepaid plans. They will scrutinize the way in which fee schedules are established in open panel plans and some of the broader closed panel operations. They are also concerned that no anticompetitive advantages are given to either kind of plan. The *Goldfarb*⁴³ case, that began with a federal district judge in Virginia enjoining further use of the Fairfax County Bar minimum fee schedule, has now been decided by the U.S. Supreme Court. The U.S. Supreme Court sustained the District Court and held that the economic activity of setting legal fees was within the purview of the Sherman Act and constituted a "rigid price floor from which petitioners, as consumers, could not escape if they wished to borrow money to buy a home." The Court was careful to add the following: "In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the state to regulate its professions."

Another roadblock to the full development of prepaid legal services as a fringe benefit is the differential treatment between health services and legal services.⁴⁴ Contributions by employers to or receipt of benefits by an employee from a health service fund are not included in gross income subject to income taxation.⁴⁵ A bill was introduced by U.S. Representative Karth in

42. The antitrust objection is that lawyers should not set fees for lawyers. Insurance companies are not lawyers and they may set fees for lawyers without violating the antitrust laws unless the insurance companies are dominated by lawyers and told what fees to pay lawyers.

43. *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491 (1973).

44. *Internal Revenue Code of 1954*, 26 U.S.C. § 105.6 (1970).

45. For an excellent discussion see, note, *Federal Income Tax Aspects for Employee-Participants in Group Legal Plans* in COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES, (American Bar Association 1973).

1974, and it has been reintroduced in the present session of Congress. It would put legal service plans on an equal footing with health plans. Its passage would certainly spur the growth of more plans.

The regulations for organizations exempt from taxation under Code Section 501 (c) (9) have been under consideration by the Treasury since 1970. It is probable that jointly trustee plans of legal services will be granted exemption, but a clear statement to that effect is yet to come.

The *insurance* commissioners have not as yet reached any uniform position on which prepaid plans to regulate and how to regulate them. In order to foster uniformity, the National Association of Insurance Commissioners adopted a model bill on prepaid legal insurance in December 1974. The bill would allow both life and casualty companies to write such policies. It has flexible provisions in regard to capitalization and qualifications to do such business. It has the following broad definition of legal insurance:

The assumption of a contractual obligation to provide specified legal services or reimbursement for legal expenses in consideration of a specified payment for an interval of time, regardless of whether the payment is made by the beneficiaries individually or by a third person for them, in such a manner that the total cost incurred by assuming the obligation is to be spread directly or indirectly among a group of persons.

None of the plans now in operation, except those underwritten by the insurance companies, are being regulated by the commissioners. Whether the state insurance commissioners can regulate activity where it is an 'employee benefit plan'⁴⁶ as defined under the Employment Retirement Income Security Act of 1974⁴⁷ depends upon interpretation of the preemption provisions in Section 514 of that Act.⁴⁸ The language of the Act on preemption reads clear and seems to preempt to the federal government any regulation of the terms and conditions of employee benefit plans. Many would argue otherwise. If read broadly, the preemption would affect not only the regulatory activities of state insurance commissioners but also the rulemaking activity of state supreme courts regarding the practice of group law. The union and consumer groups consider that there clearly is federal preemption of regulation over the terms and conditions of prepaid plans. At some point litigation will undoubtedly occur.

46. Section 3 for purposes of this title:

The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

47. Public Law 93-406.

48. Section 514(c) provides that for purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

V. IMPACT OF PREPAID DEVELOPMENTS UPON THE MINORITY BAR

At a conference on prepaid legal services held in April 1972, the moderator of one of the workshops was Donald M. Stocks, a Black lawyer, who reported the following:

The first concern was that of the minority bar and the possible exclusion of the minority lawyer from group legal services. Such exclusion might occur either 1) by virtue of the inherent design of prepaid panels or closed panels; 2) by the efforts of the organizing groups or the state bars and others who were actually involved in developing programs or approving programs. Our Panel generally concluded that the role of the minority lawyer should be that of involvement. One of the most effective vehicles would be to have him participate not only in the panels or programs that exist, but participate at the state and national level in the development of programs and in the criteria for programs so that he 1) is aware of it, and 2) he may then make his choice as to whether or not he wishes to participate in it.⁴⁹

The possible development expressed that the inherent design of a plan might exclude the minority lawyer does not appear to have happened in the broader plans of prepaid legal service. As has been noted, however, there are very few of such plans. At Columbus and Washington the lawyers who staff the Laborers' plans are about fifty percent Black.

The other conclusion reached was that minority lawyers should become involved not only in the panels providing service but participate in the development of programs. Where there are panels some minority lawyers are participating. However, the minority lawyer is less often seen. They serve as members of some of the state bar and local bar committees on prepaid legal services. One of the members of the Board of Directors of California Lawyers' Service is a Black lawyer. The particular point of view of the Black lawyer has not been put forward in too many places, either as participating lawyers, members of a board or a group that controls a program, or as developers and planners of such programs. I am not aware of any real showing of interest by Black lawyers in the development or implementation of prepaid legal service programs. I do not know the reason.

At a similar conference held two years later another Black lawyer, Stanley Kirk, made some observations on prepaid developments and then made some suggestions:

I would like to make it clear that the special problems confronting the minority lawyer will, to a substantial degree, also affect solo practitioners and small law firms in general. I suggest that the concept of prepaid legal service connotes the mandatory capacity to deliver quality legal services in quantity, thereby creating unique problems.

I believe that the issue of closed panels is going to be very important to the Black lawyer. Closed panels will automatically mean that Black lawyers, practicing on a solo basis or relatively small law firms, will be specifically excluded from participation.

In addition, I think where closed panels are involved, the inherent bias of people must be considered. For example, if the leadership of

49. ABA National Conference on Prepaid Legal Services, *Transcript of Proceedings April 27-29, 1972*, at 401.

a union is to choose the law firm to represent its members, I would suggest that the Black lawyer or law firm will not be selected because of inherent biases. In addition, I think the biases of the client must necessarily be considered when selecting the lawyer.

Another problem that confronts the Black lawyer is his lack of knowledge with respect to prepaid legal services. I have conversed with many of my fellow Black lawyers that have taken the view that prepaid legal services are a long way away. There has to be a concerted effort to insure that the Black Bar is made aware of what is occurring in this area.

Prepaid legal service plans, due to the comprehensive legal benefits that will be offered, will have to utilize law firms in order to achieve efficiency and timely delivery of the service.

In conclusion, I believe that it is not enough to merely point out problems that affect the minority lawyer but attempt to set forth constructive suggestions. Notwithstanding the position of the American Bar Association, Black lawyers must push for open panels, at least in the immediate future. I believe there is need for consultation between the American Bar Association and the Black Bar, namely the National Bar Association.

I would suggest that there should be a go-slow approach until sufficient safeguards are built into proposed plans to insure there is adequate minority lawyer participation.

I also believe special emphasis should be placed on encouragement of multi-specialty Black law firms, primarily by the National Bar Association in conjunction with the American Bar Association. Thank you very much.⁵⁰

There is certainly a tendency for many planners to think in terms of a large multi-specialty firm capable of efficient mass delivery techniques. That development has not yet occurred on a large scale in the plans utilizing staff lawyers. In time, such firms will develop fully. They will necessarily be in large metropolitan areas—areas which have a large concentration of the six thousand minority lawyers now practicing in the United States. Given the tendency of most Black lawyers to want to practice alone or in small firms, they are not likely to join the staff operations or associate in large multi-specialty firms.

There is some evidence that open panel plans will begin to develop in larger cities. However, if they do, they will probably have prerequisites to participate on the panel. A condition might be the requirement of errors and omissions insurance, some indication of specialty and other requirements to assure the client reasonably priced and quality services. Some plans initially required a sharing of the risk by participating lawyers: that is, if funds in the plan were to run out before all fees were paid, each lawyer would agree to accept a pro rata fee. My own opinion is that such a plan will be dropped later. More bar association operations are now being developed with insurance companies, and the companies bear the risk.

VI. CONCLUSION

The suggestion of both Mr. Stocks and Mr. Kirk, that there must be more involvement of the minority bar in these programs, is a good one.

50. ABA National Conference on Prepaid Legal Services and Beyond, *Transcript of Proceedings May 2-4, 1974*, at 97.

However, it is often difficult to find Black lawyers who have the inclination and the resources of time and money to spend on pro bono activities with bar associations or consumer groups interested in developing knowledge and operating plans in the area of prepaid legal services. The potential for development of greater client use of lawyers is clearly possible with these plans of services. Millions of new clients who need, but have not used, the services of lawyers are waiting, and they have waited long enough. *All* of the legal profession is needed to get the job done correctly and to the satisfaction of *all* the public and the profession.